EME COURT, U.S.
Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6551

SAMUEL C. CARRATT, JR., *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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OCTOBER TERM, 1974

No.

SAMUEL C. CARRATT, JR., *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Virginia entered on June 10, 1974, affirming the judgment of conviction of the Circuit Court of Albemarle County on January 5, 1973.

OPINION BELOW

On June 10, 1974 the Supreme Court of Virginia announced in an opinion that there was no reversible error in the judgment of the Circuit Court of Albemarle County, and affirmed the Petitioner's conviction

for possession of lottery equipment. The Opinion of the Supreme Court of Virginia dated June 10, 1974 and the Order of the Supreme Court of Virginia dated August 28, 1974 are set forth in the Appendix, *infra.*

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on June 10, 1974. On August 28, 1974 the Petition for a Rehearing was denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

A. Whether It Was Error To Rule That Probable Cause Existed for a No-Knock Entry of the Petitioner's Home in Violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

B. Whether It Was Error Not To Require Police Officers To Obtain Authorization From a Magistrate Prior To Making a No-Knock Entry of the Petitioner's Home in Violation of the Fourth and Fourteenth Amendments of the Constitution of the United States?

C. Whether It Was Error To Allow Evidence To Be Used Against the Petitioner Which Had Been Suppressed in a Prior Proceeding in Violation of the Fourth and Fourteenth Amendments of the Constitution of the United States?

STATEMENT OF THE CASE

On July 16, 1972, Petitioner was arrested at his home in the pre-dawn darkness as the result of a search of his house by police officers acting under a search warrant. The search was later found by the trial court to

be a no-knock entry. Items such as worksheets covering a three day period, accounting sheets, bank balance slips, and $3,861.00 in small denominations were seized. These items were introduced at the trial of the case, and were the sole basis for the prosecution's case.

On October 22, 1974, Petitioner was indicted for a violation of § 18.1-318.1 of the Code of Virginia, 1950, as amended, which prohibits the operation of an illegal gambling business and carries a penalty of five years and a $20,000 fine. § 18.1-318.1 (b) (2) (I) and slips, and $3,861.00 in small denominations were seized. (b) (2) (II) define an illegal gambling operation as one which involves "five or more persons" and "which remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000.00 in any single day."

Hearings were held on November 17th and November 24th, 1972, on Petitioner's Motion to Suppress the items seized as violating Petitioner's rights under the Fourth and Fourteenth Amendments of the United States Constitution in that the search was illegal because a no-knock entry was used and the search warrant itself was fatally defective. The evidence before the trial court on the question of legality of the no-knock entry indicated that the arresting officers had had the Petitioner under surveillance for a year prior to the arrest under the suspicion that he was operating an illegal gambling business. The search warrant was obtained on July 16, 1974 because the officer in charge, Officer Deavers, felt that the Petitioner had discovered the police surveillance the day prior to the arrest.

The officers decided sometime prior to arriving at the Carratt residence that a no-knock entry would be

necessary, due to information they had received from an unnamed informant. The informant had told Officer Deavers that the evidence of the crime could easily be destroyed, but did not tell Officer Deavers what kind of evidence would be found at the Carratt residence, or whether any would be found at all. Officer Deavers assumed from the informant's information that "rice" or "flash" paper was involved. Officer Deavers was also told by the informant that the petitioner, Carratt, would destroy the evidence, and that he had a gun in his home and was capable of using it.

The record does not disclose, however, upon what information the informant based his assertions, nor what evidence gave the officers reason to believe it was correct. The evidence before the Court showed that the Carratt residence had been kept under continuous surveillance from 9:00 p.m., the night before by a police officer and that no activity had been observed after 2:00 a.m. Officer Deavers testified that he knew that Mr. Carratt was crippled and that when he and his officers arrived at the house, there was no evidence of any person being awake or moving about inside the house, and that his men had completely surrounded the house prior to the entry.

On November 24, 1972, the trial court ruled that the no-knock entry was justified because the officers had probable cause to believe that the evidence would be destroyed, but quashed the indictment and suppressed the use of any of the seized items in the prosecution of the Petition under § 18.1-318.1 of the Code of Virginia because the trial court found that the Justice of the Peace who issued the search warrant had not found probable cause for a violation of § 18.1-318.1 of the Code of Virginia.

The trial court denied Petitioner's request that the items seized on July 16, 1972, be returned to him, and ruled that the Commonwealth of Virginia could retain the Petitioner's property. On November 27th, 1972, the Albemarle County Grand Jury returned an indictment against the Petitioner charging a violation of § 18.1-340 of the Code of Virginia, 1950, as amended. § 18.1-340 of the Code of Virginia provides a misdemeanor penalty for the operation of a lottery, or the buying or selling of chances, or the possession of lottery equipment.

Petitioner was tried and convicted of violating § 18.1-340 on December 12, 1972. Prior to trial, Petitioner renewed his objection to the introduction of the seized property as made on November 17 and 24, 1972, and raised the additional objection that the evidence having once been suppressed against the Petitioner, it could not be used in any other proceeding against him under the doctrine of *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385 (1920). The Court overruled the Motion. On January 5, 1973, the verdict of the jury, a one year sentence and a $500.00 fine, was imposed.

Appeal was taken to the Supreme Court of Virginia on the grounds that the search warrant failed to specify an offense as required by Virginia law, and on the grounds that there were no exigent circumstances justifying a no-knock entry, under both the Federal and State constitutions. The question of whether authorization should have been obtained for a no-knock entry from the magistrate was raised in the brief also.

On June 10, 1974, the Supreme Court of Virginia affirmed the judgment of the Circuit Court of the County of Albemarle and ruled that exigent circumstances existed which justified a no-knock entry and that the

search warrant sufficiently specified a crime under Virginia law. The trial court's ruling that the evidence seized could not be used in a prosecution of Petitioner for violation of § 18.1-318.1 was not considered by the Virginia Supreme Court in its ruling.

A timely Petition for a Rehearing was filed with the Virginia Supreme Court raising again the question of the exigent circumstances which allegedly justified the no-knock entry and raised in that court the question of whether the trial court's suppression of the property of the Petitioner for a prosecution under § 18.1-318.1 suppressed the property for use in any other prosecution under the doctrine of *Silverthorne Lumber Company* v. *United States (supra)*. A supplement to the Petition for Rehearing, filed after the time allowed for a Petition for Rehearing, raised the question of whether or not Rule 3A:28 of the Supreme Court of Appeals of Virginia, the Virginia counterpart of Federal Rules of Criminal Procedure 41 E, required the suppression of the evidence used in the prosecution of the Petitioner under § 18.1-340, as a matter of State, not Federal law.

On August 28, 1974, the Petition for a Rehearing was denied without comment by the Supreme Court of Virginia.

REASONS FOR GRANTING THE WRIT

A. THE POLICE DID NOT HAVE PROBABLE CAUSE TO BREAK AND ENTER SAMUEL C. CARRATT'S HOME WITHOUT ANNOUNCEMENT.

The plurality opinion in *Ker* v. *California*, 374 U.S. 23 (1963) empowered police officers to break and enter the homes of persons suspected of crimes when the police had probable cause to believe that the occupant had discovered the police surveillance, had demon-

strated, through furtive conduct, an intent to evade or foil the police, and was in the possession of easily destructible evidence (374 U.S. at p. 40). Left unanswered by the decision in *Ker* was the question of the quantum of evidence necessary to constitute probable cause to believe these exigent circumstances exist.

The Supreme Court of Virginia, in refusing to suppress the evidence seized from Petitioner's home, found that probable cause existed for breaking and entering the Petitioner's home because: (1) the informant had told the police that the Petitioner would destroy the evidence if the Petitioner knew the police were looking for him; (2) the informant had told Officer Deavers that the Petitioner had a .38 revolver in his home and was capable of using it; (3) the informant had told Officer Deavers that the Petitioner possessed easily destructible evidence; (4) the police suspected that the Petitioner had discovered the police surveillance. *Carratt* v. *Commonwealth*, 215 Va. 55, at p. 59, 205 S.E. 2d 653 at page 656 (1974).

Since the separate grounds relied upon by the Commonwealth of Virginia present varying problems, they will be dealt with separately.

1. The Police Had No Substantial Basis for Relying on an Informant's Statement that the Petitioner Had a Gun in His Home, and Would Destroy the Evidence.

The first two exigent circumstances relied upon by the Supreme Court of Virginia in sustaining the Petitioner's conviction in this case, that Officer Deavers had been told by the informant that the Petitioner would destroy the evidence and that the Petitioner kept a gun in his home, fail to meet the criterion of a clear line of decisions set down by this Court in *Draper*

v. *United States*, 358 U.S. 307 (1959); *Jones* v. *United States*, 362 U.S. 257 (1960); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Whiteley* v. *Warden of Wyoming State Penitentiary*, 401 U.S. 560 (1971); and *Harris* v. *United States*, 403 U.S. 573 (1971) that the bare assertion of facts by an unnamed informant to a police officer, absent corroboration, will not constitute probable cause for a no-knock entry (*Ker* v. *California*, 374 U.S. 23, at p. 36 [1963].) *Draper* found that an unnamed informant's statements would support a finding of probable cause by a police officer if they could be ". . . corroborated by the agent's observations as to the accuracy of the informant's description of the accused, and of his presence at a particular place . . .", even though ". . . the corroborative elements . . . were innocuous in themselves . . ." (*Ker* v. *California*, 374 U.S. at p. 36 [1963].) *Spinelli* and *Aguilar* carried the *Draper* analysis forward in the context of the Magistrate's function of finding probable cause, and required that an affiant bringing information before a Magistrate show reasons why the informant's statements should be believed, and what the underlying circumstances are which give the informant's reports credibility. *Harris* emphasized that the personal observation by an informant of crimes through participation in the crimes gave sufficient grounds for crediting the informant's report because the informant necessarily declared against his penal interests.

In the present case, none of the requirements of these cases is met. No amount of information showing the informant's reliability could obviate the problem in this case, because the truth or credibility of what the informant told Officer Deavers could not be substantiated by the informant's credibility or relia-

bility. The informant's assertion that the Petitioner had a gun in his home and was capable of using it, and that he would destroy the evidence was an assumption beyond the realm of the informant's personal experience and observation, and at best was based upon rumor. The fact that the informant may have been known to Officer Deavers to be reliable does not give his statement credibility, for the informant was passing information which, unknown to the informant, could have been unreliable. Nowhere in the record does it appear that the informant ever entered the Petitioner's home to determine for himself whether the Petitioner had a gun in his bedroom or not, and nowhere does it appear even that the informant ever had any dealings with the Petitioner.

The information which the informant passed on did not constitute a declaration against the penal interests of the informant, and cannot be rescused by *Harris*. Nor can it be saved by the fact that the information given to the officers in the affidavit for the search warrant. The statements of the informant could have been made months before the informant ever became involved in the Petitioner's affairs.

2. The Informant's Statements Did Not Provide Probable Cause To Believe Exigent Circumstances Existed.

Independent of the *Spinelli-Harris* problem of corroboration, there remains the problem in this case that information in the nature of generalized statements about human conduct does not suffice to show probable cause in a particular case, regardless of whether it comes from an officer's experience with easily destructible evidence and criminals possessing the same, *United States* v. *Likas*, 448 F. 2d 607, (7th Cir. [1971]); *United States* ex rel. *Ametrano* v. *Gable*, 401

F. 2d 165 (3rd Circ. 1968); *Meyer* v. *United States*, 282 F. 2d 398 (4th Circ. 1960); *People* v. *DeSantiago*, 76 Cal. Rptr. 809, 453 P. 2d 353 (1969); *Commonwealth* v. *DeMichael*, 422 Pa. 553, 277 A. 2d 159 (1971), or whether that information comes from an informant. *People* v. *Marquez*, 77 Cal. Rptr. 907, -- P. 2d — (1969). This Court, in *Vale* v. *Louisiana*, 399 U.S. 30 (1970) in a search incident to a lawful arrest case, ruled that the possible destruction of evidence would not constitute probable cause for breaking and entering a house, absent a showing of some specific circumstances indicating that evidence was actually being destroyed. There is no information in the record before the trial court to assume that the informant's information came from any other source than the informant's feeling that since the evidence was readily destructible, it would be destroyed. *Marquez* rejected the contention that generalized statements from an informant concededly well informed about the Defendant's operations that he would destroy the evidence were reliable absent a showing of the facts underlying the assertion.

Even accepting the statement at face value that the Petitioner kept a weapon in his house and was capable of using it, probable cause for a no-knock entry can not rest on that fact alone. Indeed, it would be a dubious privilege to "keep and bear arms" if by exercising that right a citizen empowered the constable to batter down his doors in the night. *Ker* required a showing of some sort of intent from a suspect act before a statement of this bland sort could give life to a reasonable apprehension of danger. Applying these principles to a proper situation, the 9th Circuit in *Gilbert* v. *United States*, 366 F. 2d 923 (1966), cert.

den. 388 U.S. 922 (1967), upheld a no-knock entry where the police, in investigating the shooting death of an officer, learned from a robbery suspect who had been mortally wounded in the shoot-out with the dead officer, that the dying robber's confederate in the attack was armed and possibly hiding in a certain apartment. California has sustained no-knock entries where the police show from reliable information that specific circumstances exist causing peril to the officers, as where the suspect is shown to be in the habit of answering the door armed with a 12 gauge shotgun. *Parsley* v. *Superior Court, Riverside County,* 104 Cal. Rptr. 643, 428 P.2d 477 (1973); *People* v. *Dumas,* 190 Cal. Rptr. 512 P. 2d 1208 (1973).

Taken at face value, the allegations of the informer that a suspect has a gun in his home and is inclined to destroy evidence do not constitute probable cause for a no-knock entry. Absent a specific showing that the presence of a gun is in such circumstances as to show a reasonable danger to officers, or a reasonable showing that the suspect is about to destroy, or is in fact destroying, evidence, the Fourth Amendment does not allow a no-knock entry.

3. The Presence of Easily Destructible Evidence Alone Does Not Constitute Probable Cause for a No-Knock Entry.

The third ground relied upon by the Supreme Court of Virginia in sustaining the no-knock entry in this case was that the evidence itself was easily destructible. *Ker* v. *California* required, however, a totality of circumstances tending to show a purpose on the part of a suspect to destroy evidence in requiring a showing of furtive conduct on the part of the suspect (374 U.S. at p. 40). In *Ker,* the suspect made a U-turn and

eluded police after apparently discovering that the police were following him. The lower federal courts and the State courts, in following the *Ker* decision, have uniformly ruled that the mere fact that evidence is destructible does not constitute probable cause for a no-knock entry. *United States* v. *Likas, (supra)*; *United States* ex rel. *Ametrane* v. *Gable, (supra)*; *Meyer* v. *United States, (supra)*; *United States* v. *Gable*, 276 F. Supp. 555 (D.C. Pa. 1967); *State* v. *Mendoza*, 104 Ariz. 395, 454 P. 2d 140 (1969); *Parsley* v. *Superior Court, Riverside County*, 104 Cal. Rptr. 643, 428 P. 477 (1973); *State* v. *Daniels*, Minn. —, 200 N.W. 2d 403 (1972); *Comm.* v. *DeMichael, supra.*

4. The Alleged Discovery of Police Surveillance by the Petitioner Does Not Constitute Probable Cause for a No-Knock Entry.

The assertion by the officers that they felt that the Petitioner had discovered their surveillance and was therefore motivated to destroy the evidence is insufficient to authorize a no-knock entry under *Ker* and is, in fact, belied by the leisurely manner in which a search warrant was obtained and executed in this case. *Ker* sustained a finding of probable cause where the defendant made furtive actions and eluded the police after having been discovered. In the present case, the record before the trial court discloses no such action by the Petitioner.

The alleged discovery of the police surveillance took place on the afternoon of the day prior to the raid on the Petitioner's home. The officers allowed a period of time well in excess of twelve hours to elapse before execution of the search warrant. The claimed concern of the police that the defendant would destroy the evidence when confronted by police officers borders on the preposterous, as the time lapse would have allowed

the defendant ample time to destroy every incriminating item and to warn his confederates, thereby frustrating the entire police operation.

5. An Examination of All the Circumstances Known to the Police Did Not Reveal Probable Cause for a No-Knock Search.

Brinegar v. *United States*, (338 U.S. 160, [1949]) found that the proper perspective for a determination of probable cause was from the standpoint of "a man of reasonable caution." (338 U.S. at p. 175-176). Looking at the Carratt situation as a whole, rather than selectively as the police chose to do, reveals that probable cause did not exist for a no-knock entry. The Carratt residence had been kept under surveillance for nine hours preceding the break-in. No activity had been observed in the house since 2:00 a.m. the morning of the 16th. Every indication was that the Petitioner and his family were sound asleep. At the time of the entry, the house had been entirely surrounded by police officers, thereby preventing any sort of escape, and putting the police in a position to detect any attempt to destroy the evidence. Officer Deavers knew that the Petitioner was crippled and that any quick movements on his part, even while fully awake, were restricted. The officers stated their suspicion that the Petitioner had, in fact, been alerted to their investigation. A man of reasonable caution would have known that the Petitioner would have had more than sufficient time to destroy all the evidence and completely disband his operation. They could also draw the conclusion from their own observations of the situation as this Court did in *Sabbath* v. *United States*, 391 U.S. 585, at p. 589 (1968), that if there was to be any peril to the officers, a forced entry was more likely to precipitate it.

In spite of clear evidence refuting the alleged reasons of the police for entering the Carratt home without announcement, they chose to do so. The Petitioner contends that the decisions of this Court forbid such action, and requests that his conviction be reversed.

B. PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT WERE VIOLATED BY THE POLICE OFFICER'S FAILURE TO OBTAIN A WARRANT AUTHORIZING A NO-KNOCK ENTRY.

This Court is facing for the first time the question of whether police officers who know of the alleged grounds for a no-knock entry well in advance of the time the actual search warrant is obtained and executed, must obtain prior authorization from a magistrate for a no-knock entry.

Investigator Deavers and his assistants knew long in advance of the actual search the reasons why they would make a no-knock entry of the Petitioner's home. In fact, they had agreed upon a no-knock entry before arriving at the Petitioner's home. It is petitioner's position that when, as here, the officers knew well in advance of the actual search the reasons allegedly establishing probable cause for a no-knock entry, they should be required to obtain authorization from a magistrate for such an entry.

The quintessential feature of the Fourth Amendment's prohibition against unreasonable searches and seizures is the requirement that police officers obtain authorization for such searches from a neutral magistrate, in order to protect the citizenry from officers whose judgment is too often clouded by their eager participation in the "competitive business of ferretting out crime". *Johnson* v. *United States*, 333 U.S. 10, at page 14 (1947); *McDonald* v. *United States*, 335

U.S. 451 (1948); *Chimel* v. *California,* 395 U.S. 752 (1969); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971). Only in certain well-defined situations, where requiring the officer to obtain a warrant would in effect put the Fourth Amendment in the position of impeding proper law enforcement rather than protecting society at large, has this requirement been waived. *Carroll* v. *United States,* 267 U.S. 132 (1925); *Katz* v. *United States,* 389 U.S. 347 (1967); *Terry* v. *Ohio,* 392 U.S. 1 (1962); *Chimel, supra.*

The warrant requirement has served not only to regulate the fact of the search itself, but the incidents of the search such as time, manner, place, items to be seized, and the grounds for the search. It is the Petitioner's position that the question of whether the police have grounds to make a no-knock entry should be determined by a magistrate in the same manner as any other incident of the search.

The policy of protection afforded by the magistrate's function is in accord with such a requirement. A forcible entry, under the circumstances of this case, is just as much an unreasonable search as a search without a warrant, and the Fourth Amendment is designed to protect against it. *Gouled* v. *United States,* 255 U.S. 298 (1921). This Court found that "the requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application" in *Miller* v. *United States,* 357 U.S. 301, at page 313 (1958). Indeed, four justices of this Court found the requirement of announcement to be inherent in the Fourth Amendment itself. (*Ker* v. *California,* opinion of Brennan, J. at pages 46-54). Before a citizen is

subjected to this type of invasion of his constitutional rights, a neutral magistrate should determine if such action is warranted when the officers have time to obtain a warrant.

Not only is the policy behind the Fourth Amendment requirement of a warrant in accord with Petitioner's position, but the failure to require prior authorization from a magistrate for a no-knock entry would leave the Fourth Amendment a stop-gap measure, instead of one of the fundamental liberties of the American constitutional system. As demonstrated by this case, once an officer has obtained a search warrant, and the suspect has done nothing to abdicate his Fourth Amendment rights, such as by giving the officers reason to believe he actually is attempting to foil or evade the law by destroying evidence, the dispassionate search warrant procedure can still produce a letter of reprise, a warrant to sack as well as search the home of a suspect. Requiring a magistrate to review such action in advance would stop the illegal practice before it starts, thereby preventing the unnecessary police tactics of which this Petitioner complains.

C. HAVING ONCE SUPPRESSED THE EVIDENCE IN A PROSECUTION OF THE PETITIONER, THE TRIAL JUDGE COULD NOT LATER ALLOW THE EVIDENCE TO BE USED AGAINST THE PETITIONER IN ANOTHER PROSECUTION.

The determination by the trial judge on November 24, 1972 that the issuing magistrate had not found probable cause for the issuance of a warrant for a search of the Petitioner's home for a violation of 18.1-318.1 of the Code of Virginia rendered the search of the Petitioner's home illegal. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Chambers* v. *Maroney*, 399 U.S. 42 (1969); *Whiteley* v. *Warden of Wyoming State Penitentiary*, 401 U.S. 560 (1971).

The only jurisdiction the trial court had over the Petitioner or his property at the time of the hearing on November 24, 1972, was by virtue of an indictment returned against the Petitioner on November 22, 1972, charging a violation of § 18.1-318.1 of the Code of Virginia, 1950 as Amended. The trial Court could not empower the Commonwealth of Virginia to retain the evidence seized, after suppressing it under that indictment. Petitioner had a right guaranteed by the Constitution to the return of his property once the trial judge found that probable cause did not exist for a search of the Petitioner's home for a violation of § 18.1-318.1. *Boyd* v. *United States*, 116 U.S. 616 (1886); *Weeks* v. *United States*, 232 U.S. 383 (1914); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920); *Go-Bart Co.* v. *United States*, 282 U.S. 343 (1931); *Byars* v. *United States*, 273 U.S. 28 (1927); *Gouled* v. *United States*, 255 U.S. 298 (1921); *United States* v. *Lefkowitz*, 285 U.S. 452 (1932); *Johnson* v. *United States*, 333 U.S. 10 (1947); *Trupiano* v. *United States*, 334 U.S. 699 (1948); *United States* v. *Calandra*, 465 F. 2d 1218 (6th Cir. 1972); *United States* v. *Napela*, 28 Fed. 2d 898 [1920] D.C. N.Y.); *United States* v. *Festa*, 192 F. Supp. 160 (D.C. Mass. 1960); *United States* v. *LeClair*, 315 F. Supp. 850 (E.D. Wisc. 1970); cf. Rule 41(E) Federal Rules of Criminal Procedure.

Having once suppressed the seized evidence against the Petitioner, the trial court could not later allow it to be introduced in a subsequent prosecution of the Petitioner. *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co., supra.* As expressed by Justice Holmes in *Silverthorne*, "The essence of a provision forbidding the acquisition of evidence in a

certain way is that not merely evidence so acquired shall not be used before the Court but that it should not be used at all." (251 U.S. at p. 385).

CONCLUSION

For the reasons set forth above, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SUPREME COURT OF VIRGINIA

FROM THE CIRCUIT COURT OF ALBERMARLE COUNTY

David F. Berry, Judge

Present: All the Justices

OPINION BY JUSTICE ALBERTIS S. HARRISON, JR.

Richmond, Virginia, June 10, 1974

SAMUEL C. CARRATT, JR.

v.

COMMONWEALTH OF VIRGINIA

Record No. 730213

Samuel C. Carratt, Jr. was indicted for operating, conducting and being concerned in managing a lottery commonly known as the numbers game, or the numbers racket, in violation of Virginia Code § 18.1-340. He was convicted of possession of numbers, records and paraphernalia. He appeals the judgment of the lower court fixing his punishment at confinement in jail for one year and a fine of $500 in accordance with the verdict of the jury.

On July 16, 1972 an affidavit was made for a warrant to search the premises of Carratt in Albermarle County in relation to an offense described as "conducting, financing, managing, supervising, directing or owning an illegal gambling business; Section 18.1-318.1 Virginia Code". A warrant was issued commanding a search of the premises of the defendant, and reciting that the premises "unlawfully contains, contrary to law, numbers, lottery tickets, adding machines, tapes, tally sheets, books and records used in numbers operation, rice paper, flash paper, telephone bills, money and other paraphernalia made, provided or procured for running a lottery; and money". The officers searched the premises and seized from defendant's dwelling the sum of $3,861 in currency of various denominations, $65.50 in rolled coins, $31.85 in loose change, and various other items

and articles that are commonly identified with the operation of the numbers game.

Thereafter Carratt was indicted for conducting an illegal gambling business in violation of Code § 18.1-318.1. The defendant filed a motion to suppress the evidence obtained in the search on the grounds that the search warrant was defective and that it was illegally executed. The court below upheld the validity of the warrant and the manner in which it was executed. However, the court found that, although the affidavit for the search warrant indicated that the search was desired incident to a violation of Code § 18.1-318.1 (which concerns "Conduct of illegal gambling business"), the language of the warrant itself indicated that it was issued to search for evidence incident to a violation of Code § 18.1-340 (which concerns "Managing, etc. a lottery, etc. of buying, selling, etc. chances"). The court held that the evidence seized could only be used in a prosecution for a violation of Code § 18.1-340, and not in the prosecution of the indictment which was then pending against the defendant charging a violation under Code § 18.1-340. The defendant's pretrial motion to suppress the evidence was renewed prior to his trial on the new indictment, and all of the proceedings that occurred previous thereto were incorporated by reference into the record of the case under review.

This appeal presents two questions: (1) Did the trial court err in failing to exclude the evidence seized under the search warrant on the ground that it was illegally executed by officers who made a no-knock entry into the defendant's dwelling; and (2) did the trial court err in admitting such evidence on the ground that the warrant failed to specify the offense in relation to which the search was to be made.

The Commonwealth contends that a no-knock entry was justified because of exigent circumstances. Carratt's home was searched about 6 A.M. on July 16, 1972. While the officers were present we are concerned primarily with the

actions of Lt. James L. Higgins, Jr., of the Albermarle County Sheriff's Department, and Criminal Investigator Carl R. Deavers, Jr., of the Virginia State Police. According to the testimony of these two officers the home was completely surrounded by officers, and Higgins and Deavers advanced to the two front doors of the residence. Higgins said they first sought entry through the left front door which was found locked. Deavers knocked on the storm door and, receiving no response, the officers went to the right front door where they again knocked. The officers then pulled open the storm door and gained entrance through the main door by forcing it. He said that at both doors they announced their presence and identified themselves as officers. He estimated that they were at the doors about a minute before their forced entry was made into the dwelling. The trial court held that this constituted a no-knock entry but that it was justified because of exigent circumstances. We agree.

The defendant was believed by the officers to be the head or banker of an extensive numbers operation in the Charlottesville-Albemarle area. For more than a year he and numerous others, allegedly a part of his organization, had been under police surveillance. On July 15, 1972 the officers had reason to believe that Carratt had obtained knowledge that he was under investigation, and they concluded that a search of his premises should be made without delay. These officers also had the benefit of information from a reliable source who was described as a respectable citizen of the Charlottesville-Albemarle community and as having given information on six prior occasions in a three-month period that had led to the arrest and conviction of felons. This informant advised Deavers that he "should be careful" for the defendant owned a .38 calibre weapon which he kept loaded in the vicinity of his bedroom and that defendant "was capable of using this weapon"; and further that "Mr. Carratt would destroy the evidence if he had

any idea whatsoever that the police officers were coming to his home". The officers had information that in his operations Carratt used rice paper, described as being soluble, and flash paper, described as a type of paper associated with the numbers game, which if touched against any spark whatever is immediately consumed and destroyed "just in a matter of a second".

It was known to the officers that Carratt had "a very large dog" that was seen routinely on the outside of the residence. The officers thought this dog to be vicious and they assigned one officer to keep the dog from biting anyone during the search. When the officers approached the dwelling to execute the search warrant the dog immediately started barking and continued barking after they had entered the dwelling.

We considered the circumstances under which a "no-knock entry" could be made in *Johnson* v. *Commonwealth*, 213 Va. 102, 189 S. E. 2d 678 (1972). There we pointed out the exceptions and qualifications to the general rule which requires that before police officers may resort to a forced entry they must identify themselves and make their purpose known. We said:

> "These exceptions have been made because of exigent circumstances and where the facts make it evident that the officers' purpose is known, or where announcement might frustrate the arrest, increase the peril of the arresting officer or permit the destruction of evidence. . . ." 213 Va. at 104, 189 S. E. 2d at 679-80.

In *Johnson* the police officers, armed with a warrant to search for drugs, justified their rapid entry into Johnson's apartment on the grounds that they had reliable information that the apartment was a place from which illegal drugs were being dispensed; that they knew the door to the apartment was protected by two locks and people seeking entry were placed under surveillance before being admitted;

and that they knew drugs were being stored and dispensed from the kitchen, a point only 3 to 4 feet from the bathroom where there were two receptacles which could have been used to dispose of and destroy evidence.

In the case under review the exigent circumstances were even greater. The officers had reason to believe that the defendant was armed and dangerous; that he had discovered that he was under surveillance; and that he was most likely anticipating a search and prepared to destroy any incriminating evidence if given the time and opportunity. It was therefore reasonable for the officers to have believed that any delay in entering the dwelling of defendant would frustrate their undertaking, increase their peril and permit the destruction of the evidence.

We next consider whether the affidavit and the warrant properly described the offense in relation to which the search was to be made.

Code § 19.1-85 prescribes the affidavit that must be made preliminary to the issuance of a search warrant. It specifies that it allege "substantially the offense in relation to which such search is to be made", and that no warrant be issued on an affidavit omitting such essentials.

Rule 3A:27 of the "Rules of Criminal Practice and Procedure" of this court provides that an affidavit for a search warrant shall, among other things, state "that the property constitutes evidence of a crime (identified in the affidavit), or tends to show that a person (named or described therein) has committed or is committing a crime (identified therein)". This Rule also specifies that the warrant to be issued by the magistrate "recite the offense in relation to which the search is to be made" and "recite that the magistrate has found probable cause to believe that the property constitutes evidence of a crime (identified in the warrant) or tends to show that a person (named or described therein) has committed or is committing a crime".

Attached to the "Rules of Criminal Practice and Procedure" is an appendix of forms, including a form search warrant. A footnote to this form indicates that in preparing a search warrant, and in describing the offense in relation to which the search is to be made, the magistrate shall "Give a brief description of the offense in relation to which the search is to be made, e.g., the murder of John Doe; possession of narcotics".

We think it obvious that the statute and Rules of Court contemplate that both in the affidavit for a search warrant, and in the warrant itself, the offense in relation to which the search was to be made should be identified briefly and in general terms rather than in the precise and legalistic language usually found in an indictment, a presentment or an arrest warrant. The object is to apprise the subject of the search of the offense being investigated and the evidence sought, and to advise the officers in advance as to what they are to be searching for. The words "operating a numbers game" or "running a lottery" are as specific as the words used in the footnote to Rule 3A:27, i.e., "the possession of narcotics". Drugs seized under a search warrant in which the offense was described as "the possession of narcotics" could be used as evidence in the prosecution of a number of drug related offenses described under the Virginia Drug Abuse Law—some felonies and some misdemeanors. *A fortiori*, gambling paraphernalia seized under a search warrant, which described the offense in relation to which the search was made as a "lottery", or a "numbers operation", would be admissible as evidence in a prosecution of a number of different offenses described in different sections of the Virginia Code dealing with lotteries and gambling.

The articles searched for under the Carratt warrant were described in the affidavit and in the warrant itself and were items or articles common, necessary and incidental to

the operation of a numbers game or racket. The officers could have been under no misapprehension as to the place they were to search, the reason for the search, the articles to be searched for, and the fact that these articles were allegedly being used in a gambling operation known as the numbers game. Neither could the defendant have been misled in any particular, or been in any doubt from the wording of the search warrant, that his premises was being searched for certain specified articles alleged to be unlawfully held and used in connection with a gambling operation known as the numbers game.

Clearly the search warrant concerned a violation of Code § 18.1-340 which, in the language of *Artis* v. *Commonwealth*, 213 Va. 220, 223, 191 S. . 2d 190, 192 (1972), "in effect prohibits a person from being *concerned* with or *aiding* in managing and drawing a lottery and from having in his possession tickets, chances, writings, etc. under certain conditions for certain purposes". In *Artis* we held the numbers game to be a form of illegal lottery and a fo m of illegal gambling, and that the sale, possession of the evidence of the sale, collection of the slips, and delivery of them, and the money, are all necessary steps in the operation of a numbers racket. We said that each step is a part of the operation and each step aids in its conduct.

The defendant says that the evidence is inadmissible because the search warrant did not refer to any specific section of the Code, whereas the affidavit for the warrant specifically referred to Code § 18.1-318. This section prohibits any person from conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business. It defines gambling as including "conducting lotteries . . . or numbers games" and defines illegal gambling business as "a gambling business which . . . [i]nvolves five or more persons who conduct, . . . all or part of such business".

It can be argued convincingly that, regardless of which section the Commonwealth's Attorney had elected to prosecute under, the evidence seized from the defendant's residence would have been admissible. In *Artis* the search was made because the defendant there, and his companions, were suspected of gambling. When the search was conducted evidence was uncovered which disclosed that Artis was operating or concerned in the numbers racket. We held, notwithstanding the original purpose of the search, "the amount of currency found there . . . was also relevant evidence in the prosecution of defendant for operating a numbers game" in violation of Code § 18.1-340. *Id.* at 224, 191 S. E. 2d at 193.

We have examined the authorities cited by counsel for defendant. In the main they involve search warrants that are fatally defective in one or more vital particulars. We find no valid objection to either the affidavit or the search warrant in the case under review. The mere fact that the warrant did not refer to the same Code section as the affidavit is of no consequence. What is important is that the warrant clearly and substantially described and identified the criminal violation in relation to which the search was being made.

The trial court's ruling that the evidence seized could not be used in a prosecution of Carratt for a violation of Code § 18.1-318.1 is not before us. We find no error in its holding that the search warrant sufficiently identified the offense in relation to which the search was made as the operation of a numbers game, and that defendant's prosecution under Code § 18.1-340 was proper.

For the reasons given the judgment of the lower court is

Affirmed.

APPENDIX B

ORDER OF THE SUPREME COURT OF VIRGINIA

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 28th day of August, 1974.

SAMUEL C. CARRATT, JR., *Plaintiff in error,*

against

COMMONWEALTH OF VIRGINIA, *Defendant in error.*

Record No. 730213

UPON A PETITION FOR REHEARING

On mature consideration of the petition of the plaintiff in error to set aside the judgment rendered herein on the 10th day of June, 1974, and grant a rehearing thereof, the prayer of the said petition is denied.

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/s/Illegible
Clerk

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Supreme Court of the United States

October Term, 1974

No. 74-655

SAMUEL C. CARRATT, JR.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the state trial court, i.e., defendant and Commonwealth. References in the Statement of Facts herein, to the state court record, will be to the appropriate pages of the transcript of the pre-trial hearing referred to subsequently herein.

QUESTIONS PRESENTED

The questions presented by the defendant are set out in his brief herein. For reasons set forth below, the Commonwealth submits that some of these questions are not properly before this Court for review. However, the Commonwealth will adopt the language of the defendant in his brief as to the subject matter of the questions he is presenting.

STATEMENT OF MATERIAL PROCEEDINGS

The defendant was indicted by the grand jury of the County of Albemarle, Virginia, on November 2, 1972, for the conduct of an illegal gambling business in violation of § 18.1-318.1, Code of Virginia (1950), as amended. This indictment was returned pursuant to the arrest of the defendant on July 16, 1972, following a search of the defendant's home which was conducted pursuant to a search warrant issued earlier that same day, and the seizure of certain items of evidence therefrom, which related to the operation of a "numbers racket."

Defendant filed a pre-trial motion to suppress the evidence obtained as the result of said search and seizure on the grounds that the search warrant was defective for technical reasons and that it was illegally executed by means of an unannounced no-knock entry. Hearings on this motion before the Circuit Court of Albemarle County were held on November 17, 1972, and November 24, 1972. The defendant did not challenge the sufficiency of probable cause for the issuance of the search warrant, and conceded that such probable cause was shown in the affidavit for the warrant. Furthermore, the defendant did not raise any objection at the trial court level to the effect that no-knock entries can

only be used after a showing of probable cause before a magistrate and after obtaining the prior approval of the magistrate.

Pursuant to said hearings, the trial court held that the search warrant was not defective nor was it illegally executed. The trial court also found that for all practical purposes this was factually a no-knock entry, although there was a limited attempt by the officers to first knock and identify themselves. The trial court did find that the affidavit for the search warrant indicated that the search was desired to investigate a violation of § 18.1-318.1 of the Code, whereas the language of the search warrant itself indicated that it was issued to search for evidence in violation of § 18.1-340 of the Code. Inasmuch as the indictment was for a violation of § 18.1-318.1 and the search warrant itself was issued for a violation of § 18.1-340, then, according to the holding of the trial court, the evidence seized pursuant to such warrant could only be used in a prosecution for a violation of § 18.1-340.

This holding of the trial court was objected to by the Commonwealth as being a more limited view than the law requires. The trial court did not grant the defendant's motion to "suppress the evidence," but only limited the Commonwealth as to what offenses could be prosecuted through the use of the evidence. The specific language of the trial court was as follows:

> "The court doesn't find any lack of probable cause for these officers going into that building without knocking, but it does find that the defendant should not be prosecuted for any crime with this evidence other than that which is alleged in the search warrant. . . . I'm not sustaining the [defendant's] motions as such as to excluding or rejecting the evidence. What I'm saying is that it's going to be limited to certain purposes. . . ."

The trial court treated its ruling as having the effect of granting a motion to quash the indictment. (See transcript of trial on December 12, 1972, p. 28; Appendix in Virginia Supreme Court, p. 120).

Thereafter, the Commonwealth procured an indictment from a special grand jury on November 27, 1972, wherein the defendant was charged with feloniously and unlawfully operating, conducting, or being concerned in managing a lottery commonly known as the numbers game or the numbers racket in violation of § 18.1-340 of the Code of Virginia (1950), as amended. The defendant's previous pretrial motion to suppress the evidence was renewed prior to his trial on this new indictment, and all of the proceedings and evidence taken at the previous hearing were incorporated by reference into the record of this proceeding.

At defendant's trial on December 12, 1972, he entered a plea of not guilty and was convicted by the jury of the misdemeanor of possession of lottery paraphernalia, primarily upon the evidence obtained pursuant to the search warrant referred to above, and was sentenced to twelve months in jail and a fine of $500.00.

The defendant appealed his conviction to the Virginia Supreme Court, and his petition for a writ of error was granted, and after full briefing and oral argument by the parties the Virginia Supreme Court affirmed his conviction. The only issues presented to the Virginia Supreme Court, as set out in defendant's brief, were as follows:

> "A. Should the evidence seized under the search warrant be excluded because the warrant failed to specify an offense in relation to which the search was to be made as required by Rule 3A:27?
>
> "B. Should the evidence seized under the search warrant be excluded because there were no exigent circumstances permitting a no-knock entry?"

In his brief in the Virginia Supreme Court, the defendant devoted approximately eight pages of argument to issue "A" above, and added at the end thereof one paragraph devoted to the point which he is now raising in question "C" in his Petition for a Writ of Certiorari herein.

In approximately nine pages of argument on issue "B" above, the defendant did not raise the question of whether prior judicial authorization is required before a no-knock entry can be made, other than to mention the fact that some states have such a requirement.

Following the opinion and ruling of the Virginia Supreme Court, the defendant filed a "Petition for Rehearing" with that Court in which he raised again and reiterated his arguments on the issue of probable cause to justify the no-knock entry; and in which he further raised the issue of whether the trial court's ruling on the admissibility of the evidence in a prosecution for a violation of § 18.1-318.1 of the Code of Virginia should have the effect of making such evidence inadmissible for any purpose. (Question Presented "C" in the Petition for a Writ of Certiorari herein.)

The Petition for Rehearing was summarily denied by the Virginia Supreme Court, without setting forth any reasons.

STATEMENT OF FACTS

At the hearing on the motion to suppress on November 17, 1972, Lieutenant Higgins of the Albemarle County Police Department and Investigator Deavers of the Virginia State Police testified as to the manner of execution of the search warrant and as to the information and facts within their knowledge prior to said execution. According to that testimony, the two officers proceeded towards the front of

defendant's house and went first to a door which they later found entered into the garage of the house and not into the main part of the house itself. They knocked on the screen door in front of that door, tried it, and found it to be locked, and proceeded to a second door nearby. Again they knocked on the screen door and identified themselves as State Police. No one answered, and they pulled the screen door open and knocked on the inner main door and again identified themselves as State Police. No one answered that knock, and Lieutenant Higgins proceeded to break the door open with his foot. The entire process of knocking on the doors and identifying themselves from the moment they arrived at the first door until the moment they were in the house took approximately one minute. As stated previously, the trial court determined that this did in fact constitute a no-knock entry.

Prior to their arrival at the home of the defendant, Investigator Deavers and Lieutenant Higgins, through surveillance and through information obtained from a reliable informant, had learned that the defendant owned a large dog who barked loudly whenever anyone came onto the defendant's premises and whom they considered to be possibly vicious. (Tr., pp. 54, 60, 61, 71, 81). They also received information that the defendant had a gun, that he was capable of using it, and that they should be careful because he could be dangerous. Further, the information was that this was a .38 caliber weapon and that the defendant kept it loaded in the vicinity of the bedroom. (Tr., pp. 61, 62, 78). The officers also had been advised by their reliable informant that the defendant would destroy the evidence they were seeking if he had any idea whatsoever that the police officers were coming to his home. It was felt that the method of destruction would be by flushing it down the

drain. They were advised by the informant that there might possible be rice paper on the premises being used by the defendant in the suspected numbers operation, and the officers knew of their own knowledge that this rice paper is easily disposed of by flushing because it is water soluble. (Tr., pp. 79-82, 62, 63). In addition, the officers, through information obtained by their own surveillance, were of the opinion that the defendant had recognized them as police officers in the process of that surveillance, on the day preceding the search, and that the secrecy of their investigation was jeopardized. This was one of the primary reasons why the search was conducted when it was, because the officers felt the defendant was now aware that he was under surveillance and would probably change his method of operation. Conversation among the officers was to the effect that the defendant might know that the officers were coming. (Tr., pp. 62, 79).

Lieutenant Higgins testified that his thoughts at the time that they were executing the search warrant were that there was a possibility that the defendant might be armed with a gun, that he might have seen the officers coming into the driveway, and would be reluctant to come to the front door. (Tr., p. 61). Investigator Deavers testified that the principal reason for making a decision to enter the premises without first knocking and advising the persons inside of who they were and what they were there for was the fact that the reliable informant had stated that the evidence would be destroyed by the defendant as soon as he learned that police officers were coming to his house, and that the evidence would be destroyed immediately. Another reason was the fact that there might possibly be some danger if the defendant were alerted prior to the officers entering his house. (Tr., p. 84).

At the trial itself, prior to the introduction of evidence, the defendant renewed his motion to suppress. In addition to the parties stipulating the evidence from the previous hearing, the state police investigator, Carl Deavers, testified that the informant who had provided all of the information about the defendant, which Deavers had previously testified about, was the same informant referred to in the affidavit for the search warrant. Deavers further testified that the informant's information as to Carratt's intention to destroy any evidence before the police got to it was received by the informant from Carratt, the defendant personally.

The information in the affidavit showed that the informant had given information to the police on six prior occasions in the past three months which had led to the arrest and convictions of persons for felonies, and that the informant is a "reputable citizen in the Charlottesville-Albemarle community." In addition the affidavit showed that the informant had had frequent direct contact with defendant's numbers operation and with the people involved in it.

At the hearing on the motion to suppress, the trial court expressly limited the evidence to only that information known by the police officers at the time they executed the warrant and did not allow any evidence to be presented as to what was found after the officers obtained admission to the defendant's premises. The ruling of the trial court on the question of whether the no-knock entry was justified was, therefore, limited solely to the knowledge of the officers at the time they executed the warrant and was in no way affected by any occurrences which took place after the officers were in the defendant's home. However, at the trial on December 12, 1972, Lieutenant Higgins testified that after they were in the defendant's house, the defendant proceeded to

walk into a room that contained his office and office desk and attempted to grab a paper bag, at which point Lieutenant Higgins placed him under arrest and struggled with the defendant over possession of the paper bag. Lieutenant Higgins hollered for help, and Investigator Deavers came to his assistance, and they subdued the defendant and obtained possession of the paper bag. Many of the contents of the paper bag were scattered throughout the floor, and it was this bag and all of its contents which were eventually admitted into evidence against the defendant as paraphernalia representative of the operation of a numbers racket. The Commonwealth's position was that this evidence was additional justification for the assumption by the officers prior to executing the warrant that the defendant would attempt to destroy the evidence before it could be obtained by the police officers.

LAW AND ARGUMENT

A. Was It Error To Rule That Probable Cause Existed For A No-Knock Entry Of The Petitioner's Home In Violation Of The Fourth And Fourteenth Amendments To The Constitution Of The United States?

The possibility of the existence of exigent circumstances in the execution of search warrants without a prior announcement of identity and purpose has been recognized by this Court in at least three cases. See *Miller* v. *United States*, 357 U.S. 301, 2 L.Ed.2d 1332, 78 Sup.Ct. 1190 (1958); *Ker* v. *California*, 374 U.S. 23, 10 L.Ed.2d 726, 83 Sup.Ct. 1623 (1963) (separate opinion); and *Sabbath* v. *United States*, 391 U.S. 585, 20 L.Ed.2d 828, 88 Sup.Ct. 1755 (1968). A prohibition against a no-knock entry is statutory in many states, as well as under certain federal statutes. [See *Hinson*

v. *State*, 236 Md. 518, 204 A.2d 516 (1964)]. However, judicial exceptions to that prohibition are allowed, even in some of the states which have statutes. In fact, no-knock entries, under exigent circumstances, have been upheld in a number of jurisdictions in a number of cases. *Johnson* v. *Commonwealth*, 213 Va. 102, 189 S.E.2d 678 (1972); *Hinson* v. *State*, *supra*; *Commonwealth* v. *Manduchi*, 189 A.2d 613 (Pa. 1964); *State* v. *Clarke*, 242 So.2d 791 (Fla. 1970); *State* v. *Christiana*, 249 La. 247, 186 So.2d 580 (1966); *People* v. *Maddox*, 46 Cal.2d 301, 294 P.2d 6; *Scull* v. *State*, 122 Ga.App. 696, 178 S.E.2d 720 (1970); *State* v. *Linder*, 190 N.W.2d 91 (Minn. 1971); *State* v. *Juliano*, 97 N.J. Super.Ct. 28, 234 A.2d 236 (1967); *Waugh* v. *State*, 3 Md. App. 379, 239 A.2d 596 (1968); *People* v. *Lujan*, 484 P.2d 1238 (Colo. 1971); *People* v. *Shelton*, 311 P.2d 859 (Cal. 1957); *People* v. *McIlwain*, 28 N.Y.A.D.2d 711, 281 N.Y.S. 2d 218 (1967); *People* v. *Hammond*, 9 Cal.Rptr. 233 (1960); *People* v. *Villanueva*, 33 Cal.Rptr. 811 (1963); *People* v. *DeLaSierra*, 91 Cal.Rptr. 674 (1970); *People* v. *Gonzales*, 92 Cal.Rptr. 660 (1971); *Masiello* v. *United States*, 317 F.2d 121 (D.C.Cir. 1963); *Gilbert* v. *United States*, 366 F.2d 923 (9th Cir. 1966).

The possible exigent circumstances recognized in *Ker* v. *California*, *supra*, were (1) if the officer's peril would be increased, and (2) if the officer's purpose would be frustrated, such as by quick and easy destruction of the evidence. A factor considered significant in *Ker* was the fact that the officers reasonably believed that the suspect would be expecting the arrival of the police, and would therefore be in a better position to destroy the evidence before it could be seized.

These same exigent circumstances were recognized by the Virginia Supreme Court in the instant case [*Carratt* v. *Com-*

monwealth, 215 Va. 255, 205 S.E.2d 653 (1974)], and in *Johnson* v. *Commonwealth, supra,* as follows:

> "These exceptions have been made because of exigent circumstances and where the facts make it evident that the officer's purpose is known, or where announcement might frustrate the arrest, increase the peril of the arresting officer or permit the destruction of evidence. . . ."

What these cases recognize is that suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would have if he had first announced his entry and purpose and waited for a reply. As pointed out in *Kaplan,* "Search and Seizure, a No Man's Land in the Criminal Law," 49 Cal.L.Rev. 474, ". . . it would seem that the perfection of small firearms and the development of indoor plumbing through which evidence can quickly be destroyed, have made [statutes requiring notice in entry before the use of force to enter] . . . a dangerous anachronism. In many situations today . . . a rule requiring officers to forfeit the valuable element of surprise seems senseless and dangerous."

The Commonwealth maintains that in the instant case, the police officers who executed the warrant did have sufficient information and facts received through a reliable informant, as well as through their own observation, which created the necessary exigent circumstances to justify a forcible, unannounced entry of the defendant's premises. First of all, the officers had been advised that the defendant had a gun, that he was capable of using it, that it was a .38 caliber revolver, that he kept it in his bedroom, and that the officers should be careful because of this gun, and because the defendant could be dangerous. Secondly, the police

had had the defendant's home and his comings and goings under surveillance for some time, and from this surveillance, the officers had personal knowledge that the defendant's house was located in such a way that they could not get close to the house without being detected, and that the defendant had a large dog that barked loudly upon the entry of a person onto the defendant's premises. Furthermore, the officers also believed that the surveillance had been discovered by the defendant, and for this reason the defendant would likely be expecting the officers to come and search or arrest him at any time.

Lastly, and most importantly, the officers had been advised that the defendant had personally told the informant that he would destroy the evidence if he had any idea whatsoever that the police officers were coming to seize that evidence. In addition, the police had reason to believe, although they did not know for sure, that much of the evidence they sought would possibly be on water soluble or "rice paper" and, therefore, be very easily disposable by flushing it, and that this was the method indicated by the defendant to the informant as to how he would, in fact, dispose of the evidence. They also knew that such rice paper was commonly used in a numbers operation, and could be disposed of instantly by contact with water.

This accumulated information and knowledge of the officers prior to their entry met all of the exigent circumstances specified in *Ker*, even though that case refers to them in the alternative rather than in the cumulative. The officers in the instant case had facts which made it evident that the officers' purpose would be known, that an announcement might increase the peril of the arresting officers and frustrate the possibility of arrest, and that an announcement prior to entry would permit the destruction of evidence by a defendant who was, in fact, intent on doing just that. The state-

ment of the defendant that he would destroy the evidence had been made to the citizen informer direct, and the citizen informer was known by the officers to be not only reliable but also a reputable citizen in the community. Therefore, the officers possessed facts which gave them probable cause to believe that the defendant was not only capable of destroying the evidence because of the possibility of easily destroyable paper and the presence of indoor plumbing on the premises, but further that the defendant was planning to, in fact, destroy the evidence if given the opportunity.

Contrary to a statement in the petitioner's brief herein, the information obtained by the officers was not "generalized statements about human conduct." To the contrary, it was specific information about this particular suspect and his specific intentions as told by him to a reputable and reliable citizen.

In addition, the defendant asserts that the police had limited information about the possible danger to the police officers executing the warrant. The information they had was that defendant had a gun easily accessible to him in the bedroom, that he was capable of using it and would do so, that he was to be considered dangerous, and that his specific intention was to prevent the police from seizing any of the evidence on the premises. This alone would justify a no-knock entry under *Ker*, without the additional factor as to the possible destruction of evidence. One would be hard-pressed to find any more reasonable grounds for use of a no-knock entry than those existing in the instant case.

The defendant, in his brief herein, has cited a number of lower court decisions to support his assertions that the no-knock entry was not justified. The Commonwealth submits that all of those cases are easily distinguishable factually and legally, and are of no precedential value.

Lastly, the defendant suggests that the information provided by the unidentified informant was lacking in reliability, citing a number of previous decisions of this Court. (See pp. 7, 8 of Petition for Writ of Certiorari). All of the cases cited by the defendant involve situations where the reliability of the informant in question was not established by direct evidence, and had to be established by independent, circumstantial facts.

Therefore, those cases are easily distinguishable from the instant case where the informant was a reputable citizen of the community and had, on a number of previous occasions, provided information which led to the arrest and conviction of persons for felonies. In addition, it was obvious that the informant had been frequently and intimately exposed directly to the defendant and his confederates and their numbers operation. He had personally talked to the defendant and had received much of his information directly from the defendant. He had participated in the numbers operation and knew how it operated. He was acquainted with many of the defendant's associates and was in a position to learn much about the defendant from them.

Even if the information concerning the defendant's gun was hearsay to the informant, it was reliable because of the informant's closeness to the defendant and his operation, and because the informant himself was a very reliable individual.

Clearly, the information available to the police officers at the time they executed the search warrant, when considered in the totality of the circumstances, and not as broken down into many little independent pieces as the defendant would attempt to do, provided the necessary exigent circumstances to justify a no-knock entry.

B. Were Petitioner's Rights Under The Fourth Amendment Violated By The Police Officer's Failure To Obtain A Warrant Authorizing A No-Knock Entry?

The defendant did not raise this issue at trial, nor did he raise it on appeal to the Virginia Supreme Court. Therefore, he is precluded from raising it now before this Court. *Parker v. North Carolina,* 397 U.S. 790, 25 L.Ed.2d 785, 90 Sup.Ct. 1458 (1970).

In his Petition for a Writ of Certiorari herein, the defendant asserts that he did raise this issue on appeal. However, a thorough reading of the facts will show that this was not the case. As set out above, the "Question Presented" to the Virginia Supreme Court, as set out in defendant's own brief therein, was as follows:

> "B. Should the evidence seized under the search warrant be excluded because there were no exigent circumstances permitting a no-knock entry?"

This is clearly not the same issue he is now raising to this Court in part "B" of his Petition for a Writ of Certiorari. The only reference to this issue in defendant's Virginia Supreme Court brief was the following language as part of defendant's argument in support of the question set out above.

> "States which have considered the question of justification for a no-knock entry have given great respect to the conclusion of an independent magistrate that an unannounced entry was necessary. The reason is apparent: a detached judicial officer stands between the all too frequent over-zealous police officer and in this case the recognized fact that a person engaged in illegal activity will dispose of damaging evidence. That the suspect may have made such a statement does not add one thing to what everyone already knows. Before an officer is entitled to rely on such a statement to execute an unan-

> nounced entry he should possess facts given in probable cause to rely on this information. He should know when the statement was made and under what circumstances, and have probable cause to believe that the defendant is in the position to destroy the evidence."

This is simply not a sufficient presentation of a separate issue such as to warrant a full determination by an appellate court.

More importantly, the Virginia Supreme Court did not confront that issue, and made no finding or conclusions as to it. Therefore, there has been no decision of the Virginia Supreme Court from which a Writ of Certiorari can be granted as to this issue. The Commonwealth submits that the Petition for a Writ of Certiorari should, therefore, not be granted.

Even if it were assumed that this issue were properly before this Court, the Commonwealth submits that it is without merit. Case law in both Virginia and in this Court is to the contrary. Absolute predetermination of probable cause by a magistrate is not required by the Fourth Amendment, since warrantless searches and seizures are permitted in a number of situations. In the instant situation, whether exigent circumstances exist to justify a no-knock entry can only be determined at the time a search warrant is executed, since it is the facts known to the officer at that moment that are controlling. See *Parsley* v. *People*, 109 Cal.Rptr. 563 (1973). The type of exigent circumstances referred to in *Ker* v. *California*, *supra*, cannot always be known at a time somewhat in advance of the actual search, when a magistrate would necessarily have to act, but might often depend on observations made by the officers immediately prior to a search. The concept of "exigent circumstances" itself is in contrast to the type of magistrate predetermination sought by the defendant herein. The Commonwealth submits that such a view is not

only unworkable practically, but is simply not in accordance with present authority.

C. Having Once Suppressed The Evidence In A Prosecution Of The Petitioner, The Trial Judge Could Not Later Allow The Evidence To Be Used Against The Petitioner In Another Prosecution.

Initially the Commonwealth submits that the defendant's factual underpinnings for this question are incorrect, and therefore the conclusions drawn therefrom are also incorrect. The state trial court judge did not "suppress the evidence" in question as asserted by the defendant.

As pointed out in the Statement of Facts above, the search warrant under which the search was conducted specified that the search was to be for items in connection with a violation of § 18.1-340, Code of Virginia (1950), as amended. When the Commonwealth sought a prosecution of the defendant for a violation of § 18.1-318.1, Code of Virginia (1950), as amended, the state trial court judge held that the evidence seized pursuant to said search warrant could not be used in that initial prosecution. The trial court judge specifically denied that he was suppressing the evidence and stated that he was only limiting the Commonwealth as to what offenses could be prosecuted through the use of such evidence. The state trial court judge found no lack of probable cause for the issuance of the search warrant or for the manner of its execution and held that it was a valid search and that all items seized pursuant to said search were legally and properly seized. The trial court judge treated his ruling as having the effect of granting a motion to quash the indictment, not as granting a motion to suppress the evidence.

Therefore, the Commonwealth submits that the trial court did not find any lacking of probable cause of any kind and did not suppress the evidence, and the argument

of the defendant herein is totally without merit, since it is based upon an assertion that there was a suppression of evidence by the trial court judge.

Secondly, the Commonwealth submits that once again defendant is trying to raise before this Court by way of a Petition for a Writ of Certiorari an issue that was not properly raised and presented to the Virginia Supreme Court on direct appeal. A review of the questions presented to the Virginia Supreme Court as set out in the Statement of Material Proceedings herein, shows that this issue was not presented by the defendant to the Virginia Supreme Court in his appellate brief. Although the defendant did include one paragraph in the brief in relation to this issue, once again the presentation of that issue was not sufficient so as to properly present it to the Virginia Supreme Court. Even more importantly, the Virginia Supreme Court in its opinion specifically stated that this issue was not before it. Respondent says, therefore, that under the authority of *Parker* v. *North Carolina*, *supra*, that the certiorari should not be granted on an issue that has not been properly presented to the Court below.

The defendant did attempt to belatedly raise this issue to the Virginia Supreme Court by way of a petition for rehearing. However, the law is clear and long-standing that the Virginia Supreme Court is limited on rehearing to a consideration of the issues that were properly presented to it in the petition for appeal previously filed. *Tazewell* v. *Herman*, 103 Va. 416, 60 S.E. 767 (1908). Consequently, this issue was never presented to the Virginia Supreme Court in a proper or timely manner.

Lastly, the Commonwealth submits that the question presented by the defendant in this last issue is totally without merit. Under the existing case law authority throughout this country, the ruling of the state trial court in the instant case,

so as to prevent the seized evidence from being used in the initial prosecution for a violation of § 18.1-318.1 was incorrect. It has long been held that evidence seized pursuant to a valid search warrant can be used in the prosecution of a crime other than the one for which the warrant was originally obtained, and that officers can validly seize evidence in addition to those matters specifically mentioned in the search warrant itself. *Warden* v. *Hayden*, 387 U.S. 294, 18 L.Ed.2d 782, 87 Sup.Ct. 1706 (1967); *Johnson* v. *United States*, 293 F.2d 539 (D.C.Cir. 1961); *United States* v. *Eisner*, 297 F.2d 595 (6th Cir. 1962); *Artis* v. *Commonwealth*, 213 Va. 220, 191 S.E.2d 190 (1972). Respondent submits that since the action of the state trial court was favorable to the defendant, and since that action was, in fact, incorrect, that at the very most it was harmless error to the defendant. Since the Commonwealth does not have a right of appeal in Virginia, there was no opportunity to review the finding of the state trial court in this case that prohibited the initial prosecution under the initial indictment. However, the Virginia Supreme Court in its opinion in the instant case recognized that such a valid argument could be made. Respondent says, therefore, that even assuming the issue was properly before this Court it is totally without merit. In addition, the Commonwealth submits that this is not an issue of federal Constitutional magnitude, but merely one of state law and procedure, and therefore not a proper issue for the granting of certiorari.

CONCLUSION

For the reasons set out herein, it is submitted that no error was committed by the trial court or by the Virginia Supreme Court, and that the decision of the Virginia Supreme Court in this case is in line with prior decisions of this

Court. Furthermore, it is asserted that not all of the issues raised before the Court in the Petition for a Writ of Certiorari were actually presented to the Virginia Supreme Court and are, therefore, not properly presented to this Court at this time. Therefore, the Commonwealth prays that certiorari not be granted and that the conviction of the defendant be affirmed.

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CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were this 14th day of February, 1975, mailed to James H. Michael, Jr., Michael and Dent, Ltd., 414 Park Street, Charlottesville, Virginia 22901, attorney for petitioner.

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